



Objectionable Publications and Indecency Legislation Bill

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Report of the Justice and Electoral
Committee

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Objectionable Publications and Indecency Legislation Bill

Recommendation

The Justice and Electoral Committee has examined the Objectionable Publications and Indecency Legislation Bill and recommends that it be passed without amendment.

Introduction

The Objectionable Publications and Indecency Legislation Bill seeks to modernise the law regarding objectionable publications to keep pace with technology, and to ensure that penalties for objectionable publication offences regarding children reflect the seriousness of the offending.

The bill proposes to achieve these aims by the following means:

- increasing the maximum penalties for the possession, importing and exporting, supply, distribution, and making of objectionable material (including child exploitation material)
- clarifying that a person could have possession of an objectionable electronic publication without saving it (or a copy of it)
- providing for a presumption of imprisonment for repeat child exploitation material offenders
- removing the requirement for the Attorney-General's consent for public prosecutions of objectionable publications and indecency offences
- creating a new offence of indecent communication with a young person (under 16 years).

Issues raised in submissions

The main areas focussed on by submitters are discussed below.

Increased penalties

The bill would increase the maximum penalties for possession, importing and exporting of an objectionable publication from 5 to 10 years; and the maximum penalty for the supply, distribution or making of an objectionable publication from 10 to 14 years. Some submitters suggested that the increase in maximum sentences should be restricted to child exploitation material, and that increasing penalties for objectionable publication offences in general might distort relativity with physical offending.

New Zealand does not have a specific child exploitation material offence; child exploitation material is a subset of publications that are “objectionable” under the Films, Videos, and Publications Classification Act 1993. The Office of Film and Literature Classification is responsible for determining what is objectionable, ensuring that all publications are dealt with consistently.

Our majority view was that restricting the increased penalties to child exploitation material could raise issues regarding other types of objectionable publication. For example, it could be argued that material depicting sexual violence against women also warrants higher penalties. Most of us consider it is preferable to maintain the current regime, which relies on judges exercising their discretion to determine a sentence that is proportionate to the offence committed. We note that section 132A(2) of the Films, Videos, and Publications Classification Act 1993 requires the sentencing court to take into account as an aggravating factor the extent to which a publication exploits children.

Presumption of imprisonment for repeat offenders

The bill provides for a presumption of imprisonment for persons convicted of any objectionable publication offence involving child exploitation material for a second or further time, unless the court considers that particular circumstances indicate otherwise. Concern was expressed about a “growing appetite” for sentencing presumptions in legislation, and an argument was made for limiting them. We agree, but consider that, like the various offences for which presumptions already exist (including supply of a class A controlled drug, and sexual violation), repeated child exploitation material offending is serious enough to warrant a presumption of imprisonment. In the view of the majority of us, providing judges with a sentencing regime to reflect the seriousness of reoffending in this area would also send a strong message that Parliament will not tolerate the exploitation and abuse of children.

Possession of electronic publications

Clause 5 of the bill would amend the Films, Videos, and Publications Classification Act to provide that possession of objectionable material includes intentionally viewing such material without knowingly downloading or saving it. The amendment is for the avoidance of doubt, and does not limit the possession offence. Telecommunications network operators need not be concerned about being caught by the new provision; having no knowledge of the content they are carrying, they would not meet the four essential elements of possession, as set out in *Meyrick v Police*.

Attorney-General’s consent for prosecutions

Clauses 8 and 12 would remove the requirement for law enforcement agencies to obtain the Attorney-General’s consent to prosecute objectionable publications and indecency offences; not all submitters were aware that consent would still be required for private prosecutions.

Indecent communication with a young person

Clause 13 would create a new offence under the Crimes Act 1961 of indecent communication with a young person (anyone under the age of 16). This would also apply to indecent communication with a police constable where the constable is believed to be a young person. The proposed offence seeks to close a gap between objectionable publications offences (where an offender records a communication with a young person) and the sexual grooming offence (where an offender takes steps to meet a young person). Clause 13 would insert new section 124A(3) into the Crimes Act providing a defence that before making the indecent communication, the person charged took reasonable steps to find out whether the young person was 16 years or older, and believed on reasonable grounds that they were at the time of the communication.

Some submitters expressed concern about entrapment, where a person charged communicated indecently with a police constable, believing the constable to be a young person. This provision is necessary to enable law enforcement officials to prosecute. We are satisfied that law enforcement agencies are fully aware of and experienced with the issues concerning entrapment, and note that judges have the discretion to exclude evidence if they believe it has been improperly or unfairly obtained.

Submitters also expressed concern that the proposed new offence was too broad, and that naïve rather than criminally motivated conduct might be unintentionally captured by the provision, leaving a young person with a criminal record. We consider this risk is mitigated by the requirement for the communication to be “indecent”, which the courts have held must be judged in light of time, place, and circumstances as warranting the sanction of the law; and we are confident that law enforcement agencies would use their discretion wisely. There would also be the defence of not knowing the material was indecent, provided the person charged had no reasonable opportunity of knowing this, and that in the circumstances their ignorance was excusable.

The absence of a definition of “indecent” in the Crimes Act 1961 also raised concern. We are aware that “indecent” is used throughout the Crimes Act, and in other statutes including the Summary Offences Act 1981, and the Telecommunications Act 2001. Although the term is used in a slightly different context in this bill, the courts can draw on a well-established body of case law on the definition of “indecent”.

Appendix

Committee procedure

The Objectionable Publications and Indecency Legislation Bill was referred to the committee on 19 November 2013. The closing date for submissions was 7 February 2014. We received eight submissions from interested groups and individuals, and heard three submissions. We received advice from the Ministry of Justice.

Committee members

Scott Simpson (Chairperson)
Paul Foster-Bell
Joanne Hayes
Raymond Huo
Alfred Ngaro
Denis O'Rourke
Hon Maryan Street
Holly Walker
Hon Kate Wilkinson

David Clendon replaced Holly Walker for this item of business.